Petition

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No.

In the Supreme Court of the United States

October Term, 1980

THE JOINT LEGISLATIVE COMMITTEE FOR PERFORMANCE, EVALUATION, AND EXPENDITURE REVIEW OF THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,

vs.

BARBARA PHILLIPS, MELVIN PHILLIPS, AND CORNELL GREEN RICE, Individually and On Behalf of a Class,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an employment discrimination case, a federal court of appeals is bound by the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure in reviewing a district court's finding of nondiscrimination by the defendant-employer.

2. In rejecting the sufficiency of the employer's articulated reasons for not hiring two of the respondents, did the court of appeals depart from the principles announced in *Texas Department of Community Affairs v. Burdine*, 450 U.S. ..... (1981)?

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BARBARA PHILLIPS, MELVIN PHILLIPS, AND CORNELL GREEN RICE, Individually and On Behalf of a Class,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, the Joint Legislative Committee on Performance, Evaluation, and Expenditure Review of the State of Mississippi [the PEER Committee], et al.,[1] re-

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1. The parties to this proceeding are as follows. The petitioners are the Joint Legislative Committee on Performance, Evaluation, and Expenditure Review of the State of Mississippi [the PEER Committee], John Hamilton, a former Director of the PEER Committee, and his successor in office, John W. Turcotte; Fred Rogers, Robert L. Crook, Carroll Ingram, Con Maloney, and Charles Nix, members of the Senate of the State of Mississippi and the PEER Committee and their successors in office, and Doug Abraham, W. E. Callicot, Jimmy Morrow, Joe Moss, and John Neill, members of the House of Representatives of the

(Continued on following page)

spectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 23, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Phillips v. Joint Legislative Committee,* 637 F.2d 1014 (5th Cir. 1981), and appears in the Appendix hereto as Appendix A. The March 16, 1979, report and recommendation of the United States Magistrate to the district court is unreported and appears in the Appendix hereto as Appendix B. The March 22, 1979, judgment entered by the United States Magistrate is unreported and appears in the Appendix hereto as Appendix C. The March 26, 1979, final judgment of the district court, adopting the magistrate's judgment and report and recommendations, is unreported and appears in the Appendix hereto as Appendix D.

Footnote continued—

State of Mississippi and the Peer Committee and their successors in office. The petitioners will be collectively referred to as the PEER Committee.

The respondents are Barbara Phillips, Melvin Phillips (no relation), and Cornell Green Rice, who brought this action both individually and on behalf of a plaintiff class of all blacks who have applied or will apply for employment with the PEER Committee and have been or will be denied employment because of their race, and all blacks who have been deterred from applying for employment with the PEER Committee because of its alleged discriminatory employment practices and its alleged reputation for engaging in discriminatory employment practices.

In addition, the Mississippi Council on Human Relations was a plaintiff in the district court. However, the district court dismissed the Mississippi Council on Human Relations as a plaintiff.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 23, 1981, Appendix E. A timely petition for rehearing was denied on April 27, 1981, Appendix F, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RULE PROVISION INVOLVED

Fed. R. Civ. P. 52(a) provides in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

STATEMENT OF THE CASE

The PEER Committee is an arm of the Legislature of the State of Mississippi which has the power to conduct performance evaluations, investigations, and critical examinations of all expenditures by any state agency. It is composed of five members of each House and has its offices in Jackson, Mississippi, where it employs a staff of about 20 research analysts. *Phillips v. Joint Legislative Committee, supra,* 637 F.2d at 1018.

In 1975, the respondents, blacks who applied for employment with the PEER Committee, brought this civil rights action in federal district court alleging that the PEER Committee discriminated against blacks in its hiring practices. The respondents asserted that this alleged discrimination violated the Fifth and Fourteenth Amendments to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. §§ 1981 & 1983. Thus, the respondents invoked

the federal court's jurisdiction under 28 U.S.C. §§ 1331 & 1343, 42 U.S.C. § 2000e-5(f)(3), and 28 U.S.C. §§ 2201 & 2202. The respondents brought this action as a class action on behalf of all blacks who applied or will in the future apply for employment with the PEER Committee and have been or will be denied employment because of their race, as well as all blacks who had been deterred from applying for employment with the PEER Committee because of its alleged discriminatory employment practices and its reputation for engaging in discriminatory employment practices.

Following discovery, the district court denied the respondents' motion for class certification because it concluded that the respondents failed to establish that the putative class was so numerous that joinder of all of its members was impracticable. Fed. R. Civ. P. 23(a)(1).

Following a trial on the merits, the district court concluded that the individual respondents Barbara Phillips, Melvin Phillips, and Cornell Green Rice had failed to prove their claim of discrimination and, acccordingly, dismissed the respondents' complaint. Appendices B, C & D.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court's refusal to certify a plaintiff class. 637 F.2d at 1021-22.

In addition, the Fifth Circuit ruled that in reviewing the district court's finding of nondiscrimination on the claims of the individual respondents, it was *not* bound by the "clearly erroneous" standard of review under Fed. R. Civ. P. 52(a). 637 F.2d at 1027. The Fifth Circuit went on to conclude that the district court's finding of nondiscrimination on the individual claims of respondents Barbara Phillips and Melvin Phillips was erroneous; and therefore, it reversed the district court on these two individual claims. 637 F.2d at 1027-29.

REASONS FOR GRANTING THE WRIT

In its opinion, the Court of Appeals for the Fifth Circuit failed to apply the "clearly erroneous" standard of review mandated by Fed. R. Civ. P. 52(a) and reversed the district court's findings in a way which is contrary to this Court's recent opinion in *Texas Department of Community Affairs v. Burdine*, 450 U.S. ..... (1981).

I.

The Fifth Circuit Erred In Refusing To Apply The "Clearly Erroneous" Standard Of Review In Reviewing The District Court's Finding Of Nondiscrimination By The PEER Committee.

In reviewing the merits of the individual claims of respondents Barbara Phillips and Melvin Phillips, the Fifth Circuit adhered to it position that the "clearly erroneous" standard of review does *not* apply to its review of the district court's finding of nondiscrimination in an employment discrimination case. 637 F.2d at 1027. This ruling is in conflict with the clear language of Rule 52(a) of the Federal Rules of Civil Procedure which prohibits the court of appeals from setting aside the district court's findings of fact unless they are "clearly erroneous".

This precise issue was just recently reserved by the Court for future consideration. *Texas Department of Community Affairs v. Burdine, supra*, 450 U.S. at ..... n.12.

This issue is ripe for decision by this Court in view of the Court's recent grant of certiorari in *Swint v. Pullman-Standard*, 624 F.2d 525, 533 n.6 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (U.S. Apr. 20, 1981) (Nos. 80-1190 & -1193) (certiorari granted limited to question one presented by each petition; question one in petition in

No. 80-1193, *United Steelworkers v. Swint* is "is Federal Court of Appeals bound by 'clearly erroneous' rule of Fed. R. Civ. P. 52(a) in reviewing district court's findings of fact, arrived at after a lengthy trial as to motivation of parties in negotiating seniority system?" 49 U.S.L.W. at 3648).

II.

The Fifth Circuit Analysis Is Contrary To This Court's Recent Decision In *Texas Department Of Community Affairs v. Burdine*, 450 U.S. ..... (1981).

Recently, this Court rejected the Fifth Circuit's position that an employer in an individual Title VII employment discrimination action must rebut a plaintiff's prima facie case of discrimination by *proving by a preponderance of the evidence* that it had legitimate nondiscriminatory reasons for not hiring the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. ..... (1981). Instead, this Court held that the defendant "bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Id.* at .....

Here, the PEER Committee clearly explained its nondiscriminatory reason for not hiring respondents Barbara Phillips and Melvin Phillips. The PEER Committee did not hire Ms. Phillips because at the time of its consideration of her application, PEER Committee officials saw reports on television and in a newspaper that Ms. Phillips was acting as a consultant to the Mississippi Council on Human Relations. 637 F.2d at 1028. This was interpreted by the PEER Committee as evidence that Ms. Phillips had accepted employment elsewhere and was no longer interested in employment with the PEER Committee. The district court accepted this explanation, but the Fifth Cir-

cuit rejected this explanation, implying that for this to constitute a legitimate nondiscriminatory reason for not hiring Ms. Phillips, the PEER Committee would have to prove that it actually offered Ms. Phillips employment. *See* 637 F.2d at 1027-28. This position is clearly inconsistent with this Court's recent opinion in *Burdine*.

The Fifth Circuit's handling of the claim of respondent Melvin Phillips is likewise inconsistent with *Burdine, supra*. The proof before the district court showed that on his employment application respondent Melvin Phillips indicated that he left his prior job because of excessive travel. John Turcotte, a staff auditor employed by the PEER Committee, testified that it was this expression of reluctance that had led to the decision not to hire Mr. Phillips. The district court accepted this explanation. But, again, the Fifth Circuit reversed. Relying on another Fifth Circuit decision, *Davis v. Jackson County Port Authority*, 611 F.2d 577 (5th Cir. 1980), the Fifth Circuit found this to be a "bare assumption" about Mr. Phillips which was insufficient to constitute a legitimate nondiscriminatory reason for not hiring Mr. Phillips. This position, again, places a burden of proof on the employer which is inconsistent with *Burdine*.

The appropriateness of granting certiorari on this issue is established by this Court's recent actions in vacating and remanding decisions by the Fifth Circuit for further consideration in light of *Burdine*. *Johnson v. Uncle Ben's, Inc.*, 623 F.2d 419 (5th Cir. 1980), *vacated and remanded*, 49 U.S.L.W. 3787 (U.S. Apr. 20, 1981) (No. 80-1420); *Falcon v. General Telephone Co.*, 627 F.2d 369 (5th Cir. 1980), *vacated and remanded*, 49 U.S.L.W. 3743 (U.S. Apr. 6, 1981) (No. 80-1264).

Because the Fifth Circuit's decision in this case represents a clear departure from this Court's recent opinion in *Burdine*, the Court should grant certiorari to correct this error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

APPENDIX

APPENDIX A

Barbara PHILLIPS, Cornell Green Rice, Melvin Phillips, and Mississippi Council on Human Relations, a corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE AND EXPENDITURE REVIEW OF the STATE OF MISSISSIPPI et al., Defendants-Appellees.

The MISSISSIPPI COUNCIL ON HUMAN RELATIONS, a corporation, Barbara Phillips, Melvin Phillips and Cornell Green Rice, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The BOARD OF TRUSTEES OF the INSTITUTION OF HIGHER EDUCATION a/k/a The State College Board et al., Defendants-Appellees.

Barbara PHILLIPS, Melvin Phillips and Cornell Green Rice, individually and on behalf of a class, Plaintiffs-Appellants,

v.

The STATE OF MISSISSIPPI AGRICULTURAL AND INDUSTRIAL BOARD et al., Defendants-Appellees.

Nos. 79-2131, 79-2940 and 79-3550.

United States Court of Appeals, Fifth Circuit.

Unit A

Feb. 23, 1981.

Rehearing Denied April 27, 1981.

Employment discrimination actions were brought against three state agencies. The United States District

Court for the Southern District of Mississippi, William Harold Cox and Walter L. Nixon, Jr., JJ., denied motions for recusal, denied most motions for class certification, and entered judgment on the merits in favor of the defendants and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) evidence of statements made by district judge in prior cases involving racial discrimination did not provide basis for recusal; (2) class certification was improperly denied; (3) racial discrimination on a class basis on the part of one employer was established; and (4) racial discrimination was shown in a number of the individual cases.

Affirmed in part and reversed and remanded in part.

1. Judges (Key) 51(4)

If affidavit of recusal is timely and technically correct, its factual allegations must be taken as true; judge must pass on legal sufficiency of the affidavit but may not pass on the truth of the matters alleged. 28 U.S.C.A. § 144.

2. Judges (Key) 51(3)

Affidavit of recusal is legally sufficient if the facts are material and stated with particularity, the facts are such that they would convince a reasonable person that bias exists if they are true, and the facts show that the bias is personal as opposed to judicial in nature. 28 U.S.C.A. §§ 144, 455.

3. Judges (Key) 51(4)

Under statute requiring a judge to disqualify himself in any proceeding in which his impartiality might be reasonably questioned, judge need not accept all the allegations by moving party as true and, in fact, no motion at

all is required; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by whom they are drawn to his attention. 28 U.S.C.A. § 455.

4. Judges (Key) 49(1)

The alleged bias of a judge must be personal as distinguished from judicial in nature in order to require recusal. 28 U.S.C.A. §§ 144, 455.

5. Judges (Key) 49(1)

Motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases nor on a demonstrated tendency to rule in any particular way nor on any particular judicial leaning or attitude derived from his experience on the bench. 28 U.S.C.A. §§ 144, 455.

6. Judges (Key) 49(1)

The fact that a judge's remarks or behavior take place in the judicial context does not exclude them from scrutiny and from requiring recusal if they reflect such pervasive bias and prejudice as would constitute bias against one of the parties. 28 U.S.C.A. §§ 144, 455.

7. Judges (Key) 49(2)

Where most of the allegations of bias concerned the trial judge's rulings or comments on the merits in previous cases, where some of the older remarks reflecting racial reactions which were outmoded and improper were not gratuitous insults and did not show overt hostility, and where all of the allegations concerned the judge's final conclusions or immediate reactions on points of law or facts in the case before him, they did not require recusal. 28 U.S.C.A. §§ 144, 455.

8. Federal Courts (Key) 819
Judges (Key) 51(4)

Recusal motion is committed to the sound discretion of the district judge and on appeal it will be asked only whether he has abused his discretion. 28 U.S.C.A. §§ 144, 455.

9. Federal Civil Procedure (Key) 184

Where neither party could determine how many black applicants there were, let alone identify all of them, and where the class included future and deterred applicants who were necessarily unidentifiable, joinder was impracticable even if the number was small. Fed.Rules Civ.Proc. Rule 23(a)(1), 28 U.S.C.A.

10. Federal Civil Procedure (Key) 171

Requirement that the district court decide whether to certify a class in any case as soon as possible after the commencement of the action is a command to the district court, not to the parties, and the court has an obligation to make the determination on its own motion if necessary. Fed.Rules Civ.Proc. Rule 23(c)(1), 28 U.S.C.A.

11. Federal Civil Procedure (Key) 164

Fact that plaintiffs had delayed in making motion to certify the case did not show that they would be inadequate class representatives, especially where a good deal of the time had been consumed in litigating motions for change of venue and for recusal.

12. Federal Civil Procedure (Key) 171

Even if attorney for plaintiffs would be disqualified from representing the class, it does not follow that the class may not be certified; court may make certification

contingent on replacement of counsel or on severance of the individual claim of the offending class representative.

13. Federal Civil Procedure (Key) 164

Fact that one of the named plaintiffs was an attorney for the civil rights law firm representing the plaintiff, although she was not acting as an attorney in the case, did not preclude class representation on the theory that she was an inadequate representative because of a potential conflict with other class members where any attorney fees granted in the case would come directly from the defendants and not from any fund created for class relief. Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e-5(k).

14. Federal Civil Procedure (Key) 184

Where named plaintiffs did not seek to represent a class consisting exclusively of persons who had been deterred from making applications because of the racial policies of the employer, but, rather, also sought to represent unsuccessful applicants, the named plaintiffs could represent the persons who had been deterred from applying.

15. Federal Courts (Key) 858

District court's finding of nondiscrimination is a determination of ultimate fact to which the clearly erroneous standard does not apply.

16. Civil Rights (Key) 44(1)

Evidence that general population of the state was 37.2% black, that total civilian work force was 29.8% black, that 31.6% of the persons registering at the state Employment Security Commission for professional jobs

were black, that 27.8% of those registering for clerical or sales jobs were black, and that the percentage of blacks at one employer was between 1.5% and 6.5% black made out a prima facie case of discrimination.

17. Civil Rights (K y) 13.11

Named plaintiffs who all had college degrees lacked constitutional standing to challenge legality of employer's educational requirements for a college degree for certain positions.

18. Civil Rights (Key) 44(1)

Evidence of disparity between number of blacks in the work force and the number of blacks hired by employer, evidence of employer's history of discrimination in not having hired a single black during its first three decades of existence, and evidence that hiring procedures relied heavily on subjective judgments of executives from personal interviews demonstrated discrimination against blacks.

19. Civil Rights (Key) 9.10

Whether subjectivity in hiring is necessary or not, subjective judgments are suspect as job qualifications when they are exercised by members of an all white executive or supervisory staff.

20. Civil Rights (Key) 46

In view of past discrimination against blacks by state agency, court should direct the agency to set goals of approximately 20% black employment, separately for clerical and nonclerical positions, should require it to undertake an aggressive campaign of recruitment and advertising to procure sufficient qualified black applications,

and should, until those goals were achieved, require that one-third of all persons hired within a predetermined six-month period for permanent clerical or nonclerical jobs be black.

21. Civil Rights (Key) 43, 44(1)

To raise a prima facie case of employment discrimination, plaintiff must show that he belongs to a racial minority, that he applied and was qualified for job which the employer was seeking applicants, that he was rejected despite his qualifications, and that the position remained open after his rejection; burden then shifts to the employer to show some legitimate, nondiscriminatory reason for the applicant's rejection; plaintiff is then afforded an opportunity to show that the employer's stated reason is, in fact, a pretext.

22. Civil Rights (Key) 44(1)

Employer bears the burden of showing a legitimate reason for rejection of minority applicant by a preponderance of the evidence.

23. Civil Rights (Key) 44(1)

Evidence of employer's belief that black applicant had taken another position did not rebut a prima facie showing of employment discrimination where the employer claimed that an immediate decision to hire the applicant had been made but the employer procrastinated for several weeks without making an offer and where the evidence showed that race was a consideration.

24. Civil Rights (Key) 44(1)

Fact that black applicant had indicated that he left his previous position because it required excessive travel

was insufficient to rebut a prima facie case of discrimination against the black applicant on the theory that he had expressed a reservation about job-related travel where the employer described the travel requirements to the applicant but did not ask him if the travel requirements would be excessive.

25. Civil Rights (Key) 44(1)

In view of evidence that it was the routine practice of the employer to make no effort to further contact "walk-in" applicants, black walk-in applicant did not establish that denial of employment was due to racial discrimination.

26. Civil Rights (Key) 44(1)

Evidence established that black applicant was not qualified for any vacant position.

27. Civil Rights (Key) 44(1)

Evidence that, during the year following black applicant's application, only one white applicant was hired for position for which the black applicant might have been qualified and that the white applicant was more qualified demonstrated that black applicant had not been discriminated against on the basis of race.

28. Civil Rights (Key) 9.10

"Vacancy" within the meaning of the *McDonnell Douglas* test need not exist on the precise day of the application; any vacancies within a reasonable time must be considered as well.

See publication Words and Phrases for other judicial constructions and definitions.

29. Civil Rights (Key) 44(1)

Evidence that white was hired as a secretary scarcely two months after black secretary applied and absence of evidence that white was more qualified established that black was discriminated against because of her race.

30. Civil Rights (Key) 44(1)

Establishment of liability on class claim of employment discrimination operates to establish a prima facie case on behalf of each member of the class.

31. Civil Rights (Key) 44(1)

Evidence that, after employer obtained necessary federal funds for position which it intended to offer black applicant, it was informed that the black applicant had moved to another city to resume her law studies and that it then abandoned its plans for the new job demonstrated that the failure to hire the black applicant was based on a belief that she was no longer interested in employment and not racial discrimination.

32. Civil Rights (Key) 44(1)

Belief that black applicants were available for employment for only a short period of time based on the fact that they took other employment did not rebut prima facie case of racial discrimination.

33. Civil Rights (Key) 38

Black applicant for a job is not required to either remain permanently unemployed or forfeit his cause of action for racial discrimination.

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Appeals from the United States District Court for the Southern District of Mississippi.

Before WISDOM, RUBIN and SAM D. JOHNSON, Circuit Judges.

WISDOM, Circuit Judge:

These appeals concern three allied lawsuits brought against Mississippi state agencies for employment discrim-

ination. The named plaintiffs are the same in the three cases: Barbara Phillips, Melvin Phillips (not related), and Cornell Green Rice.[1] All are black. In each case the plaintiffs sought to represent a class of black job applicants.

The defendant[2] in No. 79-2940 is the Joint Legislative Committee on Performance Evaluation and Expenditure Review ("PEER"), an arm of the Mississippi legislature with power to conduct performance evaluations, investigations, and critical examinations of all expenditures by any state agency. It is composed of five members of each House. It employs a staff of about twenty research analysts and clerical workers. Its offices are in Jackson.

The defendant in No. 79-2131 is the Mississippi Agricultural and Industrial Board ("A&I"), an agency created to promote industrial and agricultural development and tourism. Its members are the Governor, the Lieutenant Governor, the Speaker of the Mississippi House, four state legislators, three other state officials, and twenty-five public members appointed by the Governor. Among its functions are approval of industrial bond issues, study and recommendation of tax exemptions for Mississippi ports and harbors, and dissemination of tourist information. The Board employs a staff of sixty to eighty persons at its main office in Jackson.

The defendant in No. 79-3550 is the Board of Trustees of the Institutions of Higher Learning (commonly known as the College Board), the governing body for Mississippi's state universities and colleges. Its members are appointed

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1. The Mississippi Council on Human Relations was an original party plaintiff in all three cases. It was dismissed for lack of a real interest in the outcome in the PEER and A&I cases.

2. In all three cases there are also individual defendants: the members of each defendant board or committee, certain staff executives, and other present and former state officers.

by the Governor. The Board employs a staff of about eighteen financial analysts and clerical workers in Jackson. This suit concerns the Board's employment practices with regard only to that staff and not to the university system generally.

All three suits were brought as class actions in the Northern District of Mississippi, alleging racial discrimination in the defendants' employment practices in violation of Title VII of the Civil Rights Act of 1964 as amended.[3] The cases were transferred to the Southern District of Mississippi under 28 U.S.C. § 1404(a) (1976). Although the PEER and A&I cases were consolidated for some preliminary purposes, the three were tried separately.[4] In the PEER and A&I cases the plaintiffs moved for the district judge's recusal. The motions were denied, and this Court refused to issue a mandamus ordering recusal of the trial judge. *In re Phillips*, No. 76-4038 (5 Cir. Nov. 19, 1976). In the PEER and College Board cases, the court refused to certify the alleged classes. In the A&I case the court certified a class of all past black unsuccessful job applicants, but refused to broaden the class to include future black applicants or persons deterred from applying by A&I's alleged discriminatory practices or reputation. After full trials on the merits, the court granted judgments for the defendants on all claims.

On appeal, the plaintiffs contend (1) that the district judge erroneously refused to recuse himself in the A&I

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3. 42 U.S.C. §§ 2000e to 2000e-17 (1976). The complaints also cited *id.* §§ 1981, 1983. The plaintiffs appeal only on the Title VII judgments.

4. The PEER and A&I cases were assigned to Hon. William Harold Cox. U.S. Magistrate John R. Countiss presided over the trials and most other proceedings in the cases. Judge Cox adopted Magistrate Countiss's findings of fact and conclusions of law. The College Board case was assigned to and tried by Hon. Walter L. Nixon, Jr.

case;[5] (2) that the court improperly refused to certify classes in the PEER and College Board cases; (3) that the court improperly narrowed the class certified in the A&I case; and (4) that the court's judgments on the merits are legally incorrect or clearly erroneous. We affirm the district court's decisions as to recusal and as to some of the individual claims. We reverse, however, as to the remaining individual claims, as to the class certification issues, and as to the merits of the class claim in the A&I case.

I. RECUSAL

Barbara Phillips, acting on behalf of her co-plaintiffs, filed an Affidavit of Personal Bias and Prejudice in the A&I case, seeking the recusal of Judge William Harold Cox. Phillips's affidavit did not state any facts relating to any bias against any of the particular plaintiffs or in favor of any of the particular defendants in the case. Rather, she attempted to show that Judge Cox is prejudiced against all blacks and that he is hostile to civil rights suits. Some of her allegations are conclusory accusations, lacking in particularity. Others recite particular judicial rulings, quotations from written opinions, and alleged remarks from the bench, in five cases over Judge Cox's nineteen-year judicial career. Phillips also recited statistics concerning the frequency with which this Court has affirmed or reversed Judge Cox's rulings in civil rights cases.

[1, 2] There are two statutes governing recusal of federal district judges. 28 U.S.C. §§ 144, 455 (1976). Section 144 provides in part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

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5. As noted, the same judge refused recusal in the PEER case as well. The plaintiffs have chosen not to appeal that decision.

> that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

If an affidavit filed under section 144 is timely and technically correct, its factual allegations must be taken as true for purposes of recusal. The judge must pass on the legal sufficiency of the affidavit, but he may not pass on the truth of the matters alleged. *Berger v. United States*, 1921, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed 481; *Parrish v. Board of Commissioners*, 5 Cir. 1975, 524 F.2d 98, 100 (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *Davis v. Board of School Commissioners*, 5 Cir. 1975, 517 F.2d 1044, 1051, *cert. denied*, 425 U.S. 944, 96 S.Ct. 1658, 48 L.Ed.2d 188 (1976); *United States v. Roca-Alvarez*, 5 Cir. 1971, 451 F.2d 843, 847-48. In *Parrish*, we stated that an affidavit is legally sufficient if it meets a three-part test:

> 1. The facts must be material and stated with particularity.
>
> 2. The facts must be such that, if true, they would convince a reasonable person that bias exists.
>
> 3. The facts must show the bias is personal, as opposed to judicial in nature.

524 F.2d at 100, quoting *United States v. Thompson*, 3 Cir. 1973, 483 F.2d 527, 528, *cert. denied*, 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974).

[3] Congress rewrote the second statute, section 455, in 1974. Subsection (b) of that section lists a number of specific situations in which a judge must recuse himself; none apply here. Subsection (a), a more general provision, requires that

case before him. We would be reluctant, in any but an extreme case, to base a disqualification order on such allegations. It is a district judge's duty to conduct trials, weigh evidence, consider the law, exercise his discretion, and reach decisions in the cases on which he sits. If he understands that a seemingly harsh comment toward a party or an attorney, or a perceived tendency to give severe sentences to some class of offenders, or an aggregate imbalance in victories for plaintiffs or defendants in a particular class of cases may subject him to a train of successful recusal motions in future cases, he may consciously or subconsciously shape his judicial actions in ways unrelated to the merits of the cases before him. Whether his conclusions in every case are the same as those that we (or these plaintiffs) would have reached is immaterial. A judge is not a computing machine, and the judicial system is not constructed so that each judge must reach the same result as all other judges in a given case. If a judge's "error" amounts to incorrect law or an abuse of discretion, appellate courts exist to correct it. Within that boundary, he not only may, but should, exercise his independent judgment on the facts and on the law. Presumably, for this attribute, among others, he was appointed. *See Serrano*, 607 F.2d at 1150-51; *United States v. Johnson*, 4 Cir. 1976, 537 F.2d 1170, 1175; *Baskin v. Brown*, 4 Cir. 1949, 174 F.2d 391, 394; B. Cardozo, The Nature of the Judicial Process 98-141 (1921); Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73-74 (R. Pound, ed., 1964); Friendly, The Courts and Social Policy; Substance and Procedure, 33 U.Miami L.Rev. 21 (1978); Advisory Committee's Note, Fed.R.Evid. 201.

We do not mean to hold that prejudice against a class, as opposed to a particular litigant, can never form the basis for recusal. *See Davis*, 517 F.2d at 1051. Nor do we say

that a clearly evinced policy of disregarding the merits in any class of cases can withstand a recusal motion. *See United States v. Thompson*, 3 Cir. 1973, 483 F.2d 527, *cert. denied*, 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974). *See also United States v. Clements*, 5 Cir. 1981, 634 F.2d 183. But we caution against a district judge disqualifying himself on the basis of an allegation of a perceived history of rulings that a moving party dislikes. This case provides a good example of the results that might follow. Phillips's affidavit contains nothing pertaining to the parties or subject matter of the A&I case; it could be repeated, word for word, by literally any black civil rights plaintiff from now until Judge Cox's retirement. With only minor modifications, it could be used by any black party—a black criminal defendant, say. This is a type of recusal for whole classes of cases, without the constitutional safeguards that protect a judge from removal from office save by impeachment. The Constitution does not contemplate that we dispense with a judge's service on such a grand scale on any but the most compelling showing. *See Steering Committee*, 614 F.2d at 966; *Archbold-Newball*, 554 F.2d at 682; *United States v. Partin*, 5 Cir. 1977, 552 F.2d 621, 637 n.20, *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). Congress has provided another remedy for judicial intemperance. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Public Law 96-458, § 3, 96th Congress, 94 Stat. 2035, 2036 (1980), amending 28 U.S.C. § 372.

[8] We also do not suggest that Judge Cox was required *not* to recuse himself. Another judge, facing a similar question, might well decide the other way. A recusal motion is committed to the sound discretion of the district judge, and on appeal we ask only whether he has abused his discretion. *Davis*, 517 F.2d at 1052; *United States ex rel. Weinberger v. Equifax, Inc.*, 5 Cir. 1977, 557 F.2d

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Section 455, unlike section 144, does not stipulate a formal procedure by which it must be raised. Like section 144, however, it may be raised by motion. *Davis,* 517 F.2d at 1051. Substantively, the two statutes are quite similar, if not identical.[6]

[4-6] Under either statute, the alleged bias must be "personal", as distinguished from judicial, in nature. *Davis,* 517 F.2d at 1052; *Parrish,* 524 F.2d at 100; *Steering Committee v. Mead Corp.,* 5 Cir. 1980, 614 F.2d 958, 964-65; *United States v. Serrano,* 5 Cir. 1979, 607 F.2d 1145, 1150, *cert. denied,* 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *Whitehurst v. Wright,* 5 Cir. 1979, 592 F.2d 834, 837-38; *Heppele v. Johnston,* 5 Cir. 1979, 590 F.2d

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6. To the extent that there is a difference, section 455 imposes the stricter standard: a movant under section 144 must allege facts to convince a reasonable person that *bias exists, Parrish,* 524 F.2d at 100, while under the broader language of section 455, he must show only that a reasonable person "would *harbor doubts* about the judge's impartiality", *Potashnick v. Port City Constr. Co.,* 5 Cir. 1980, 609 F.2d 1101, 1111 (emphasis added), *cert. denied* ..... U.S. ....., 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). *See* Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi.L.Rev. 236, 243-50 (1978). *See also* Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv.L.Rev. 736, 745-50 (1973).

On the other hand, section 455, unlike section 144, does not require the judge to accept all allegations by a moving party as true. Indeed, the section requires no motion at all; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by whom they are drawn to his attention. *See Fredonia Broadcasting Corp. v. RCA Corp.,* 5 Cir. 1978, 569 F.2d 251, 254-57, *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1979). Section 144, by contrast, requires allegation by affidavit within a stringent time limit and allows a party only one such affidavit in any case. If a party could bind a judge by his factual allegations in a section 455 motion, free from the formal requirements and more demanding standard of proof of section 144, the result would be a virtual open season for recusal. *See* 46 U.Chi.L.Rev. at 250.

609, 613; *United States v. Archbold-Newball*, 5 Cir. 1977, 554 F.2d 665, 682, *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1973). The point of the distinction is that the bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case". *United States v. Clark*, 5 Cir. 1979, 605 F.2d 939, 942 (per curiam). Thus, a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench. *United States v. Grinnell Corp.*, 1966, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793; *Berger*, 255 U.S. at 31, 41 S.Ct. at 232; *Steering Committee*, 614 F.2d at 964; *Serrano*, 607 F.2d at 1150; *Clark*, 605 F.2d at 942; *United States v. Caicedo-Asprilla*, 5 Cir. 1980, 632 F.2d 1161, 1165.[7]

[7] Here, most of Phillips's allegations concern Judge Cox's rulings or comments on the merits in previous cases. Some of them are misleadingly quoted out of context. At times, especially in some of the older instances, his remarks reflected racial reactions not only outmoded but improper. These remarks were unseemly, and we do not condone them. Nevertheless, they are not enough to require recusal. The comments alleged are not gratuitous insults and do not show overt hostility or the like; in every instance they concern the district judge's final conclusions or immediate reactions on points of fact or law in the

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7. The single fact that a judge's remarks or behavior take place in a judicial context does not exclude them from scrutiny if they reflect "such pervasive bias and prejudice . . . as would constitute bias against a party". *Davis*, 517 F.2d at 1051; *Whitehurst*, 592 F.2d at 838. *See also United States v. Ritter*, 10 Cir. 1976, 540 F.2d 463 (per curiam), *cert. denied*, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).

456, 463-64, *cert. denied*, 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978). We cannot say here that he has done so.

II. CLASS CERTIFICATION

The plaintiffs assert errors in all three cases concerning class certification. In the PEER case the district court refused to certify a class of unsuccessful past black applicants, future black applicants, and persons deterred from applying because of the Committee's reputation or history as an employer given to race discrimination. The court held that the purported class was not numerous enough under Fed.R.Civ.P. 23(a)(1). In the College Board case the court refused to certify a similar class on the ground that the plaintiffs did not show that they could adequately represent the class, in light of their delay in moving for class certification. In both cases the defendants assert an alternative ground for the court's refusal: an alleged conflict of interest between the plaintiffs' counsel and the purported class. The A&I case presents the issues differently. There the court certified a class of actual black applicants but refused to include future applicants and deterred persons, citing problems of numerosity, delay in moving, and lack of nexus between the named plaintiffs and the excluded persons. We find that none of the asserted reasons justify the court's decisions to refuse certification or to narrow the class certified.

A. Numerosity

The district court in the PEER case noted that the plaintiffs had met all the requisites for certification of a class under Rule 23(b)(2), except the requirement of Rule 23(a)(1) that the class be so numerous that joinder of all members is impracticable. Since PEER did not record the race of its applicants, it is impossible to tell exactly how many black applicants there were. The plaintiffs

nonetheless established at a certification hearing that there were at least 33 such applicants; there may have been many more.[8]

[9] The problem before the district court, and now before us, is not simply to say whether 33 class members are enough or too few to satisfy Rule 23(a)(1). Ample case law can be cited to show that smaller classes have been certified and larger ones denied certification for lack of numerosity. *See* 3B J. Moore & J. Kennedy, Federal Practice ¶23.05 (2d ed. 1980). Such number comparisons miss the point of the Rule. The proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors. Here, neither party can even count how many black applicants there are, let alone identify all of them. Moreover, the alleged class includes future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met, for "joinder of unknown individuals is certainly impracticable". *Jack v. American Linen Supply Co.*, 5 Cir. 1974, 498 F.2d 122 (per curiam); *Jones v. Diamond*, 5 Cir. 1975, 519 F.2d 1090, 1100; *see* B. Schlei & P. Grossman, Employment Discrimination Law 1095-97 (1976).

The same reasoning holds true in the A&I case, where the district court cited numerousity as a ground for ex-

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8. The defendants tentatively identified eleven unsuccessful black applicants, based on the recollection of PEER executives or on the fact that some applicants graduated from predominantly black universities or colleges. Nausead Stewart, an attorney for the plaintiffs, testified that she was personally acquainted with eight other applicants and knew them to be black. Finally, fourteen black applicants were identified by comparing PEER's applicant list with a voter registration list for the City of Jackson. The court accepted the figure 33. 3 Record at 73. There may have been many more. Any black applicant who attended an integrated college, who did not register to vote in Jackson, and who did not know Stewart would not have been identified as black.

cluding future and deterred applicants from the class certified. Moreover, aside from the inherent impracticability of joinder of such parties, there is the fact that the court did certify a class of actual applicants. It is hard to see how a class already numerous enough can become insufficiently numerous through the inclusion of an unknown number of additional members. *See Hebert v. Monsanto Co.*, 5 Cir. 1978, 576 F.2d 77, 80, *vacated on other grounds*, 580 F.2d 178 (5 Cir. 1978).

B. Delay

[10] Rule 23(c)(1) commands the district court to decide whether to certify a class in any case "as soon as practicable" after commencement of the action.[9] The district court invoked the principle of that rule in refusing to certify a class in the College Board case, finding that the plaintiffs had delayed too long in moving for class certification. This lapse, it held, warranted denial of the motion because it cast doubt on the plaintiffs' ability to represent the class adequately. *See East Texas Motor Freight v. Rodriguez*, 1977, 431 U.S. 395, 404-05, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453, 463. Similarly, the court cited delay as a reason for narrowing the class in the A&I case.[10]

[11] We think the court went too far in both cases. Neither *East Texas Motor Freight* nor any other precedent

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9. Rule 23(c)(1) is cast as a command to the district court, not the parties; hence, a district court has an obligation to make the determination on its own motion if necessary. *Gore v. Turner*, 5 Cir. 1977, 563 F.2d 159, 165; *United States v. United States Steel Corp.*, 5 Cir. 1975, 520 F.2d 1043, 1052, *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976); *Garrett v. City of Hamtramck*, 6 Cir. 1974, 503 F.2d 1236, 1243; *Castro v. Beecher*, 1 Cir. 1972, 459 F.2d 725, 731.

10. This, of course, is inconsistent with the court's certification of the narrowed class in the A&I case. Since we conclude that delay would not justify a complete refusal to certify either the lesser or the greater class, we need not decide how best to resolve the inconsistency.

that we have found has held that delay in moving for certification is sufficient in itself to disqualify a party as a class representative. The case would be different if the plaintiffs' motion had been untimely under an applicable local rule, but here there was no such rule.[11] Although the plaintiffs doubtless could have been more diligent in making their motion, in the circumstances of these cases we do not think their delay was so inexcusable as to render their representation inadequate. The record reflects that a good deal of the time was consumed in litigating the defendants' motions in all three cases for a change of venue, the plaintiffs' motions in two cases for recusal, and the plaintiffs' attempt to obtain mandamus relief in this Court on the recusal issue. The rest of the time was spent in extensive discovery, much of which was relevant to the class certification question. Accordingly, we find that the district court was too draconian in refusing certification on this ground.

C. Conflict of Interest

[12] The defendants in the PEER and College Board cases raise another ground for noncertification, one not relied on by the district court.[12] This Court has adopted a per se rule under Canon 9 of the Code of Professional Responsibility[13] that an attorney who is the partner or spouse of a named class representative is disqualified from acting as counsel for the class. *Zylstra v. Safeway Stores, Inc.*, 5

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11. S.D.Miss. Local Rule 18, requiring that plaintiffs move for class certification within 45 days of the filing of the last answer, had not been adopted at the time of trial.

12. The district court has expressly rejected this contention in a related case. *Mississippi Council on Human Relations v. Mississippi Dept. of Justice*, Civil No. J76-118(R) (S.D.Miss.) (Opinion of June 18, 1980, on motion to disqualify counsel).

13. "A lawyer should avoid even the appearance of professional impropriety."

Cir. 1978, 578 F.2d 102, following *Kramer v. Scientific Control Corp.*, 3 Cir. 1976, 534 F.2d 1085, *cert. denied*, 429 U.S. 830, 97 S.Ct. 90, 50 L.Ed.2d 94 (1976). In the PEER and College Board cases, counsel for the plaintiffs are the Lawyers' Committee for Civil Rights Under Law and two of its attorneys. Barbara Phillips, one of the three named plaintiffs in the two cases, is one of the attorneys for the Lawyers' Committee (although she is not acting as an attorney in these cases). Accordingly, the defendants argue, if the class were certified the Lawyers' Committee would be disqualified as counsel. For that reason, they say the plaintiffs are not adequate class representatives under Rule 23(a)(4).[14]

[13] Although we agree wholeheartedly with the rule announced in *Zylstra* and *Kramer*, we hold that it does not apply here. Our holding in *Zylstra* is an exception to our general rejection of per se rules under Canon 9 in *Woods v. Covington County Bank*, 5 Cir. 1976, 537 F.2d 804. The *Zylstra* rule is directed at a particular ethical problem: the potential conflict that arises when a class representative stands (or appears to stand) to gain financially from an award of attorney's fees made out of a class fund. Put simply, the cause for concern is that the class representa-

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14. The defendants' attempted use of the *Kramer-Zylstra* rule requires something of a leap in logic. *Kramer* and *Zylstra* both involved motions to disqualify counsel. Each of the cases before us, by contrast, involves a contention that a would-be class representative should not be allowed to serve. As the *Kramer* Court noted, the issues raised in the two contexts are "related, but not identical. . . . [One] relates to who may serve as class representative, while the [other] relates to who may serve as counsel." 534 F.2d at 1088. Supposing that the Lawyers' Committee is disqualified from representing the class under *Zylstra*, it does not necessarily follow that the class may not be certified. For example, the district court could make certification contingent on replacement of counsel or on severance of the individual claim of the offending class representative. We need not reach this problem, however, since we hold that the Lawyers' Committee may properly represent the classes.

tive may be too generous with the class's money in granting a fee to his own partner or spouse. *See Zylstra*, 578 F.2d at 104; *Kramer*, 534 F.2d at 1089-90, 1091; *id.* at 1093 (Rosenn, J., concurring). Here the problem does not arise. Any attorney's fee granted in these cases will come directly from the defendants under 42 U.S.C. § 2000e-5(k) (1976), and not from any fund created for class relief; hence, Ms. Phillips would never have the opportunity for overgenerosity.

D. Nexus

[14] The district court in the A&I case concluded that it should exclude from the plaintiff class persons deterred by A&I's policies from applying there because the named plaintiffs lack any "nexus" with deterred persons. The court reasoned that, since the named plaintiffs did apply to A&I, they have no standing to represent persons whose grievance is that they have been prevented from applying.

This ground for narrowing the class is faulty as a matter of law. The argument would be sound if these plaintiffs sought to represent a class consisting *exclusively* of deterred persons; in such a case the plaintiffs would lack standing to represent the putative class, in the same sense that a high school graduate lacks standing to bring a class action challenging a high school requirement. *Payne v. Travenol Laboratories, Inc.*, 5 Cir. 1978, 565 F.2d 895, 898-99, *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *see East Texas Motor Freight v. Rodriguez*, 1977, 431 U.S. 395, 403-04, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453, 461-63. Here, however, the plaintiffs are members of the class they seek to represent, and the only issue is the breath of the definition of that class. The requirement that the named plaintiffs' claims be "typical" of the claims of the class,

Fed.R.Civ.P. 23(a)(3), does not mean that all claims must be identical. Rather, a named plaintiff who has allegedly suffered from the defendant's racial discrimination may bring an "across the board" class action to represent all persons who have suffered from the same discriminatory policies, whether or not all have experienced discrimination in the same way. *Satterwhite v. City of Greenville*, 5 Cir. 1978, 578 F.2d 987, 993-94 n.8 (en banc), *vacated on other grounds*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1979), *Hebert v. Monsanto Co.*, 5 Cir. 1978, 576 F.2d 77, *vacated on other grounds*, 580 F.2d 178 (1978); *Long v. Sapp*, 5 Cir. 1974, 502 F.2d 34; *Johnson v. Georgia Highway Express*, 5 Cir. 1969, 417 F.2d 1122. Hence, we have approved the practice of allowing rejected applicants to represent classes including those deterred from applying. *E. g., Jack v. American Linen Supply Co.*, 5 Cir. 1974, 498 F.2d 122 (per curiam). Indeed, if this were not the case, most such persons would go without relief entirely, since it is unlikely that one of them would sue and qualify as a class representative.

Because the district court erred in refusing to certify any class in the PEER and College Board cases, we remand them for trial as to the class allegations.[15] The A&I case went to trial as a class action. It does not appear that the court's error in restricting the class scope could have affected the trial in any important way. We therefore reach the class merits in that case.

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15. Despite counsel's statement to the contrary, it is apparent from the record that the court in each case conducted the trial solely as an action on the named plaintiffs' individual claims, and that evidence pertaining to class allegations was excluded. PEER Transcript at 17-18; College Board Transcript at 21, 44, 49. We therefore decline to reach the class merits of these cases.

III. THE MERITS: THE A&I CLASS ACTION

[15] In reviewing the merits of the case as to alleged class discrimination, we keep in mind that the district court's finding of nondiscrimination is a determination of ultimate fact to which the "clearly erroneous" standard of review does not apply. (We are bound, of course, by the district court's findings of subsidiary fact and judgments of credibility unless they are clearly erroneous.) Fed.R.Civ. P. 52(a); *Williams v. Tallahassee Motors, Inc.*, 5 Cir. 1979, 607 F.2d 689, 690; *East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338-39; *Causey v. Ford Motor Co.*, 5 Cir. 1975, 516 F.2d 416, 420-21.

The record indicates that the A&I Board employed no blacks from its inception in 1942 through 1972. In 1973 the first black was hired to form and head a new subunit, the Office of Minority Business Enterprise (OMBE). According to a stipulated set of employee lists, the Board employed five blacks in December 1974 (7.9 percent of the Board's total); eleven blacks in December 1975 (12.0 percent); fifteen blacks in December 1976 (17.6 percent); and thirteen blacks in 1977 (12.5 percent). These figures are skewed, however, by the inclusion of the OMBE staff and short-term employees hired under the federal Comprehensive Employment and Training Act (CETA).[16] Both programs derive most of their funds from federal sources. OMBE has its own hiring procedure, separate from the rest of the Board.[17] Its staff has always been

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16. Pub.L.No.93-203, 87 Stat. 839 (1973), later codified at 29 U.S.C. §§ 801 to 999 (Supp. III 1979).

17. There is much dispute between the parties as to whether OMBE is really "part of" A&I. The point is unimportant. Thomas Espy, the OMBE director, did all the hiring for OMBE (subject to the approval of the executive director), while Harold Cross,

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all or nearly all black. The record does not reflect how CETA employees are hired, but their positions are temporary. The CETA program is subject to closer federal scrutiny as to equal employment practices than is A&I's employment generally. Excluding these persons, the figures are much lower; one black (1.5 percent) in 1974; one black (1.4 percent) in 1975; seven blacks (9.5 percent) in 1976; and six blacks (6.5 percent) in 1977. Even these statistics hide another key fact: although roughly half of the Board's staff is professional, technical or managerial, A&I has never hired a black permanent employee (outside of OMBE) for anything but a clerical position.

Most of the real debate between the parties concerns the relevant labor market to which A&I's hiring statistics are to be compared.[18] Actual applicant flow, often the

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Footnote continued—

administrative assistant to the executive director, hired the staff for all other parts of A&I (likewise subject to approval). Thus, whether or not OMBE is operationally part of A&I, we cannot consider it as all of a piece with the rest of the Board for purposes of evaluating the fairness of A&I's hiring procedures.

18. Besides the problem of which demographic measurement best suits the case, there is disagreement as to the proper geographical area. Here, perhaps, is where a purely numerical analysis fails most visibly. There is never any ascertainable demarcation line showing from where a particular employer can or cannot draw employees. Whether a potential employee will commute or relocate to take a job depends not only on his personal tastes, but also on the types of work he does, prevailing economic conditions, the features of the two communities concerned, and any number of other factors. Moreover, the problem is inevitably complicated by the effect of the employer's own recruiting and hiring practices. *See generally Hazelwood School District v. United States*, 1977, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768.

In this case, the parties dispute whether the proper area is the entire state or only the Jackson Standard Metropolitan Statistical Area. The relevant figures, however, are remarkably close for both areas in nearly all important measures. The only substantial difference is that blacks make up a higher fraction of applicants for white collar jobs (professional, technical, managerial, clerical, and sales) in the Jackson area than in the state at large.

best measurement, is unavailable here because A&I does not identify its applicants by race. Other statistical measures are necessarily imperfect in differing ways and varying degrees. The best the court can do is to accept what figures are available; allow for imperfections, skewing factors, and margins of error; and then take the figures for what they are worth. Sometimes this is much, sometimes little. *See United Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 418; *Williams*, 607 F.2d at 693; *Hester v. Southern Ry.*, 5 Cir. 1974, 497 F.2d 1374, 1379-81.

[16] The general population of Mississippi was 37.2 percent black at the time of the 1970 census. According to figures from the Mississippi Employment Security Commission, the total civilian work force was 29.8 percent black in 1977. In February 1978, 31.6 percent of persons registering at that Commission for professional, technical, or managerial employment were black; 27.8 percent of registrants for clerical or sales jobs were black. Although these statistics have their flaws, we think the disparity between them and the Board's hiring record is sufficient to raise a prima facie case of class discrimination and to shift the burden to the Board to show that the discrepancy results from other causes. *Robinson v. Union Carbide Corp.*, 5 Cir. 1976, 538 F.2d 652, 659-61, *modified on other grounds*, 544 F.2d 1258 (5 Cir. 1977), *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977).

[17] A&I's only substantial response is to point out that only 11.5 percent of all high school graduates in the Mississippi work force were black (as of 1973, the latest year for which figures are in evidence).[19] This is material,

19. Actually, the defendants state that 14.9 percent of such graduates are black. Appellees' Brief at 12. This is due to the Board's misreading of the M.E.S.C. table, Plaintiffs' Exhibit 32 at table 6: what that table states is that 14.9 percent of Mississippi

(Continued on following page)

but, by itself, it is insufficient. Many of A&I's clerical positions do not require a high school diploma, according to the Board's own job descriptions. Moreover, almost all of the nonclerical positions require a college degree; blacks made up 18.1 percent of the Mississippi work force with degrees. Considered against the figure for A&I's black nonclerical hiring—zero, outside of OMBE—that figure does much to deflate the rebuttal argument.[20]

[18, 19] Even so, we might hesitate to find discrimination in this case on the basis of these statistics alone. Here, however, there are other indicators. The district court found that A&I has a clear history of discrimination, not having hired a single black during its first three decades of existence. Its hiring procedures rely heavily on the subjective judgments of its executives from personal interviews, a procedure that can easily be used to mask racially motivated hiring decisions.[21] Such facts can buttress sta-

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Footnote continued—

blacks in the labor force are high school graduates. The error becomes more serious with regard to college graduates: the Board reports that only 3.7 percent of Mississippi college graduates are black, but a little long division shows that the correct figure is 18.1 percent.

20. Because the named plaintiffs all have college degrees, they lack constitutional standing to challenge the legality of A&I's educational requirements under *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and *Scott v. City of Anniston*, 5 Cir. 1979, 597 F.2d 897, *cert. denied*, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). *See Payne v. Travenol Laboratories, Inc.*, 5 Cir. 1978, 565 F.2d 895, 898-99, *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). Accordingly, that issue is not presented in these cases, either here or in the district court.

21. To note this fact is not necessarily to find fault with A&I's procedure or job criteria. In fact, the Board's bulky set of job descriptions is about as detailed and specific as can reasonably be expected. Given the nature of A&I's work, some subjectivity in hiring is unavoidable, especially with regard to nonclerical positions. Whether necessary or not, however, subjective judgments are suspect as job qualifications when they are exercised by members of an all-white executive or supervisory staff. *See Jenkins v. Caddo-Bossier Ass'n for Retarded Children*, 5 Cir. 1978, 570 F.2d 1227, 1229 (per curiam).

tistical evidence by suggesting a qualitative explanation for a quantitative result.

[20] In light of these facts, as found by the district court and amply supported by the record, we conclude that the district court erred in its conclusion of nondiscrimination against the class. On remand, the district court should direct the Board to set goals of about twenty percent black employment outside OMBE, separately for clerical and nonclerical positions. A&I should undertake an aggressive campaign of recruitment and advertisement to procure sufficient qualified black applicants to make these goals feasible. Further, until these goals are achieved, one third of all persons hired within predetermined six-month periods for permanent clerical or nonclerical jobs outside OMBE shall be black. The district court shall take any other concurrent or later actions necessary to eliminate the effects of past discrimination at A&I and to procure the rights of the plaintiff class and its members. *See Morrow v. Crisler,* 5 Cir. 1974, 491 F.2d 1053 (en banc), *cert. denied,* 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1979); *Franks v. Bowman Transportation Co.,* 5 Cir. 1974, 495 F.2d 398, 418-20, *rev'd in part on other grounds,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *NAACP v. Allen,* 5 Cir. 1974, 493 F.2d 614; *Davis v. County of Los Angeles,* 9 Cir. 1977, 566 F.2d 1334, 1342-44, *vacated as moot,* 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979); *United States v. City of Chicago,* 7 Cir. 1977, 549 F.2d 415, 436-37, *cert. denied,* 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1978); *Boston Chapter, NAACP, Inc. v. Beecher,* 1 Cir. 1974, 504 F.2d 1017, 1026-28, *cert. denied,* 421 U.S. 910, 96 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *United States v. Masonry Contractors Ass'n,* 6 Cir. 1974, 497 F.2d 871, 877; *Erie Human Relations Commission v. Tullio,* 3 Cir. 1974, 493 F.2d 371; *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission,* 2 Cir. 1973,

482 F.2d 1333, 1339-41, *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *Carter v. Gallagher*, 8 Cir. 1971, 452 F.2d 315, 330-31 (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972).

IV. THE MERITS: THE INDIVIDUAL CLAIMS

[21, 22] The standard and order of proof in an individual claim under Title VII are by now familiar. To raise a prima facie case, the plaintiff must show (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open. The burden then shifts to the employer to show some legitimate, nondiscriminatory reason for the applicant's rejection.[22] The plaintiff is then afforded a fair opportunity to show that the employer's stated reason is in fact a pretext. *McDonnell Douglas Corp. v. Green*, 1973, 422 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; *Furnco Construction Co. v. Waters*, 1978, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957. This formula must not be applied mechanically, but flexibly, with a view toward the particular hiring procedures and factual situation presented. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Peters v. Jefferson Chemical Co.*, 5 Cir. 1975, 516 F.2d 447, 450. On

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22. This Court has consistently held that the employer bears the burden of showing his legitimate reason by a preponderance of the evidence. *Burdine v. Texas Department of Community Affairs*, 5 Cir. 1979, 608 F.2d 563, 567; *Turner v. Texas Instruments, Inc.*, 5 Cir. 1977, 555 F.2d 1251, 1255; *Whiting v. Jackson State University*, 5 Cir. 1980, 616 F.2d 116, 121; *Jefferies v. Harris County Community Action Ass'n*, 5 Cir. 1980, 625 F.2d 1025, 1030. The Supreme Court has granted certiorari on the question, however. *Texas Department of Community Affairs v. Burdine*, 447 U.S. 920, 100 S.Ct. 3009, 65 L.Ed.2d 1112 (1980). We, of course, adhere to the Fifth Circuit rule pending the Supreme Court's decision, but it is not a matter of importance; under our view of the cases, none of the nine individual claims present turn on the applicability or nonapplicability of the *Burdine* rule.

appellate review, we are bound by the district court's findings of credibility and of subsidiary fact unless they are clearly erroneous. The clear error standard, however, does not apply to the ultimate conclusion of discrimination or nondiscrimination. *Williams v. Tallahassee Motors, Inc.*, 5 Cir. 1979, 607 F.2d 689, 690; *East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338-39; *Causey v. Ford Motor Co.*, 5 Cir. 1975, 516 F.2d 416, 420-21.

A. The PEER Case

[23] 1. *Barbara Phillips.* Barbara Phillips applied to the PEER Committee on July 12, 1974. She had interviews with John Hamilton, the Director of the Committee staff, and John Turcotte, a staff auditor. Both men testified that they were very favorably impressed with Phillips's credentials, her manner, and her knowledge of PEER's functions.[23] At their request, she brought in a writing sample. The two men decided right away to hire Phillips, but they did not inform her of that. After the initial interview, Phillips was never told that she was under serious consideration.[24] Three weeks after their interview with her, Hamilton and Turcotte saw reports on television and in a newspaper that Ms. Phillips had filed EEOC complaints against PEER and other agencies and that she was acting as a consultant to the Mississippi Council on Human Relations.[25] The district court found that she would have been hired but for these news reports. Hence, it concluded, PEER established a legitimate reason for not hir-

23. Transcript at 114, 188-89, 397-98. Usually we do not give transcript and record citations. We make an exception in this case for the convenience of this Court, should there be a petition for a rehearing en banc, and for the convenience of the Supreme Court, should there be an application for a writ of certiorari.

24. Transcript at 128, 188, 345, 400.

25. Transcript at 114-16, 128, 430-31.

ing Phillips—Hamilton's and Turcotte's beliefs that she was already employed. The court also held that Phillips had not shown that reason to be a pretext.[26]

After carefully examining the record, we believe that this finding is clearly erroneous. The defendant's theory fails because it cannot adequately explain why, if Hamilton and Turcotte were so impressed with Ms. Phillips's qualifications that they decided immediately to hire her, they procrastinated for several weeks. In fact, the record shows that race was very much on their minds. Hamilton testified that hiring Phillips was "an important decision" because she would have been the first black employee at PEER. He and Turcotte were concerned about the reaction of the white legislators on the Committee and the white staff to such a step, as well as Phillips's own reaction to the "alien world" of the white-dominated agency. The reason for the delay, both men testified, was that they were mulling over the "significance" or "complexities" of hiring blacks at PEER.[27] One need not question the good faith of Hamilton and Turcotte to conclude that the ultimate decision not to hire Ms. Phillips was as much due to her race as was the delay in offering her a position. Given their enthusiasm for her qualifications, it is hard to believe that they would not have at least inquired as to the possibility of hiring her away from her "consulting" position but for their apprehensions about her race.[28] We do not mean to say that Title VII always requires an employer to pursue black applicants even after they are hired elsewhere. We hold only that, on the record in this case, we cannot avoid the conclusion that the reason offered was a convenient

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26. Record at 676-77.

27. Transcript at 113, 118-19, 128-29, 144, 346-47, 362; *see id.* at 210, 262-63.

28. Her position was, in fact, unpaid. Transcript at 224-25.

way out of an uncomfortable decision—in other words, a pretext.

[24] 2. *Melvin Phillips.* Melvin Phillips applied to PEER on August 30, 1974. John Turcotte interviewed him. When he called back the next day he was told that there were no openings. The district court found that Turcotte rejected Mr. Phillips because he had expressed a reservation during the interview about job-related travel.[29]

This finding is clearly erroneous. There is literally no evidence that Mr. Phillips said in his interview that he was unwilling to travel. On the contrary: although Turcotte testified that he had told Phillips about the travel requirements of the job, he was certain that Phillips had not expressed any reservation about them.[30]

Presumably, what the district court had in mind was Mr. Phillips's statement on his employment application that he had left his last job because it required excessive travel[31] Turcotte testified that it was this expression of reluctance that had led to the decision not to hire Phillips.[32] If this was indeed the reason for the rejection, it is insufficient as a matter of law to rebut Phillips's prima facie case. Turcotte's reason was, at best, a bare assumption about Phillips's intentions at the time of his application—an assumption made all the more unreasonable by Phillips's silence about the travel requirements Turcotte described to him and Turcotte's failure to ask the obvious question. We have held that an unchecked assumption that an ap-

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29. Record at 672. The court also noted that the next person hired, Susan Hymel, was better qualified than Phillips. This is immaterial, since Turcotte testified that the hiring of Hymel was not at all connected with the rejection of Phillips. Transcript at 441.

30. Transcript at 463-64.

31. Defendants' Exhibit 2; *see* Transcript at 327.

32. Transcript at 412, 415.

plicant would not accept a job cannot be a legitimate reason for failing to offer the job, or at least to make inquiry about the assumption. *Davis v. Jackson County Port Authority*, 5 Cir. 1980, 611 F.2d 577. Here, in fact, Phillips testified that he had not said anything about travel because he was unemployed and needed the job to support his family. He later took a job requiring travel.[33]

3. *Cornell Green Rice.* On September 19, 1974, Cornell Rice visited PEER's offices to apply for a clerical or secretarial job. She left a completed (although unsigned) application form with a receptionist, but she did not speak with anyone else or set up an interview. She never called back or made any further effort to keep in contact with PEER.

[25] The district court found that Rice did not make out a prima facie case because there were no vacancies for which she was qualified. This is probably incorrect.[34] Even so, it is clear from the record that the defendants showed a valid, nondiscriminatory reason for not hiring Rice. According to the uncontradicted testimony of Turcotte and Hamilton, it was routine practice at PEER to make no effort to make further contact with "walk-in" applicants—those who do nothing more than leave or mail in a resume or application form.[35] Rice's attempt to impeach this explanation by counterexample only reinforced it.[36] It is not for us to say whether this procedure is sen-

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33. Transcript at 331, 483.

34. As we shall discuss later, a vacancy within the meaning of the *McDonnell Douglas* test does not mean only an opening existing at the precise date of application, but any opening during the time that the application remains active. The record shows that two white secretaries were hired within two months of Rice's application. Record at 185-86.

35. Transcript at 178-79, 454-55; *see id.* at 135.

36. Transcript at 452-55.

sible, or even fair; it is sufficient for our purposes that it is race-neutral and that it has not been shown to be pretextual. Accordingly, we decline to disturb the district court's ruling on this claim.

B. The College Board Case

1. *Barbara Phillips.* On July 9, 1974, Barbara Phillips went to the receptionist's desk on the first floor of the building in which the Board's offices are located. She took an application form home, filled it out, and mailed it in. Ten days later, Dr. E. E. Thrash, the Board's executive director, sent her a letter stating that there were no vacancies for a person of Phillips's qualifications.

[26] We find no clear error in the district court's finding that Ms. Phillips was not qualified for any vacant position. The Board employs a staff of about 18 persons; most of its work concerns the financial problems of Mississippi higher education. Thrash testified that he rejected Phillips because there was nothing in her application to suggest that she had any experience or expertise in financial matters or in higher education.[37] Her education had been in history and in law, proficiency at which would not qualify her for any of the Board's professional positions.[38] Nor did she appear to be qualified for most clerical jobs, since she left blank the space on her application for typing and shorthand skills.[39] She was qualified, Thrash testified, for the position of file clerk, but that job has not been open since before 1974.[40] We believe that this evidence provides adequate support for the district court's ruling.

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37. Transcript at 72, 76, 94; Plaintiffs' Exhibit 13.

38. Transcript at 72-74, 76, 94, 98. The Board handles none of its own legal work. *Id.* at 94-95.

39. Plaintiffs' Exhibit 13; Transcript at 72, 79.

40. Transcript at 74, 79.

2. *Melvin Phillips.* Melvin Phillips testified that he went to the College Board on September 6, 1974. A receptionist informed him that there were no application forms, but he had an informal interview with Charles Coffman, an associate director. Coffman, Phillips said, told him that there were no openings then and that there were no positions for persons with B.A. degrees.[41]

The district court rejected Mr. Phillips's testimony and found that he had not applied to the Board. This was error. This finding rests on a misreading of Coffman's testimony; indeed, the parties stipulated in the pretrial order that Phillips did apply.[42]

[27] Despite this discrepancy, we affirm the district court's ruling. Examination of the record reveals that, during the year following Mr. Phillips's application, only one white applicant was hired in a position that Phillips might have filled. That one, Ward Shaw, had a master's degree in economics and experience as a college instructor. He was hired on a temporary basis to do a study of the feasibility of certain proposed program additions at Alcorn State University, a job for which he was better qualified than Phillips.[43] Given this absence of any relevant vacancies, we must agree that Phillips did not make out a prima facie case of racial discrimination.

3. *Cornell Green Rice.* Cornell Rice interviewed with Thrash on September 19, 1974. He told her that there were no jobs open then and would be none in the foresee-

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41. Transcript at 213-15.

42. Record at 735. Coffman did not testify that he never interviewed Mr. Phillips, but only that he did not recall doing so. He pointed out that he interviews many applicants and easily might not remember one in particular. Transcript at 265-66.

43. Plaintiffs' Exhibit 4; Transcript at 77, 96-97.

able future. She left her resume and application. She never heard from the Board.[44]

[28, 29] The district court found that Rice was not hired because there were no vacancies when she applied.[45] This is clearly erroneous. The evidence shows that Bonnie Childers, a white, was hired as a secretary scarcely two months after Rice's application.[46] The defense made no attempt to show that Childers was better qualified than Rice, and there is no indication of how long the vacancy she filled had existed.[47] A vacancy, within the meaning of the *McDonnell Douglas* test, need not exist on the precise day of application; any vacancies within a reasonable time must be considered as well.[48] *McLean v. Phillips-Ramsey, Inc.*, 9 Cir. 1980, 624 F.2d 70, 72 (per curiam); *Neely v. City of Grenada*, 1977, N.D.Miss., 438 F.Supp. 390, 409; *see East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338. Since no attempt was made to show a legitimate reason for hiring Childers instead of Rice, we hold that Rice is entitled to judgment.

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44. Transcript at 227-28.

45. Record at 920. The court also adverted to testimony that Robert Harrison, a black member of the Board, had approached Rice about working at the Board and that Rice had said she was not interested. It is not clear how much the court relied on that fact, but any reliance would have been misplaced. The evidence shows that, when Harrison approached Rice, she was earning more than the Board would pay. At the time of her application, by contrast, she was unemployed. Transcript at 137-40, 227.

46. Plaintiffs' Exhibit 4.

47. Childers's application is in the record, Record at 392, but it is not obvious that her credentials or experience exceed Rice's. She was not mentioned at trial. Through an apparent clerical error, the departure date for the person Childers replaced is plainly misreported. Record at 559, 569.

48. There is at least one example on the record, occurring a few months before Rice's application, of a white applicant being hired months after applying. Plaintiffs' Exhibit 3 (Martha D'Aquino).

C. The A & I Case

[30] The individual claims in the A & I case come to us in a different posture from those in the other two cases because of our holding that the plaintiffs proved that A & I is guilty of discrimination against the plaintiff class.[49] The establishment of liability on the class claim operates to establish a prima facie case on behalf of each member of the class. Once the individual plaintiff proves that he applied unsuccessfully, the burden shifts to the employer to establish that its failure to hire that individual was the result of legitimate nondiscriminatory reasons. *International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 357-62, 97 S.Ct. 1843, 1865-68, 52 L.Ed.2d 396, 428-32; *Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 771-73 & n.32, 96 S.Ct. 1251, 96 S.Ct. 1267-68 & n.32, 47 L.Ed.2d 444, 466-67.

[31] 1. *Barbara Phillips.* Barbara Phillips visited the A & I Board during July 1974. She testified that she was interviewed by Harold Cross, administrative assistant to the director, but other evidence shows (and the district court found) that Phillips actually spoke with Robert Robinson, the executive director.[50] Robinson testified that he was very impressed with Phillips's credentials and intelligence, but that he had no positions at that time suitable for her. He offered to assist her in obtaining a job at another agency. At the same time, however, he described to her a new position that he wanted to create in the Industrial Department, for which he thought Phillips would be well suited. He took two telephone numbers

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49. We also note that in this case, unlike the other two, there is no claim for backpay or other money relief. The complaint is expressly limited to a cause of action for injunctive and declaratory relief, and neither party introduced any evidence as to the propriety or amount of backpay awards.

50. Record at 456; Transcript at 58, 145-46, 160-62.

for her and asked her to check back. Over the next three weeks Robinson worked at arranging federal funds for the new position. When he succeeded, he called Phillips's telephone number to speak to her about the job. At one there was no answer; at the other, he was told that Phillips had moved to Chicago to resume her law school studies at Northwestern University. He abandoned his plans for the new job.[51]

The district court credited Robinson's testimony and found that the sole reason why Phillips was not hired was because Robinson believed she was no longer interested in employment in Jackson. There is abundant evidence to support this finding. In light of the facts, it is not clear that Phillips was rejected at all. Even if she was, we agree with the district court that Robinson's testimony adequately established a legitimate, nondiscriminatory reason for the rejection.[52]

2. *Melvin Phillips.* Melvin Phillips applied at the A & I Board on August 28, 1974. After filling out an application, he spoke briefly with Harold Cross. Cross said there were no jobs available in A & I, but referred him to Thomas Espy, head of OMBE. Espy also had no jobs. Phillips called Espy a few times, but he never heard from A & I again.[53]

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51. Transcript at 160-62, 164.

52. This holding is not in conflict with *Davis v. Jackson County Port Authority*, 5 Cir. 1980, 611 F.2d 577, or our holding on Melvin Phillips's claim in the PEER case. In those cases the employers jumped to unwarranted conclusions while foregoing obvious opportunities to ask about them. The difference here is simply a matter of reasonableness; there is a point at which Title VII does not require an employer otherwise acting in good faith to verify every possible logical assumption on which he might rely. We are influenced in this determination by Robinson's remarkable efforts to create a position for Phillips when he found none available.

53. Transcript at 72-80.

[32, 33] The district court held against Phillips because, it concluded, he was only available for employment for a short period of time, and all white applicants hired during that period were better qualified than he.[54] We think that the court improperly constricted its scrutiny of the Board's hiring. Title VII does not require a plaintiff to remain permanently unemployed or forfeit his cause of action for racial discrimination. Nor can the Board contend here, as it did in the case of Barbara Phillips, that Phillips's apparent departure from the job market was a legitimate reason for not hiring him, for there is no evidence that anyone at A & I ever learned that he had taken another job. According to A & I's own written procedures and Cross's testimony, applicants remain under active consideration for all openings within a year of the date of application.[55] During the year following Phillips's application, A & I hired seventeen non-clerical employees, fourteen of whom were white. Excluding OMBE and temporary CETA appointments, they hired four such persons, all white.[56] A & I's failure to show a legitimate business reason for hiring these persons instead of Phillips is fatal to its defense.

3. *Cornell Green Rice.* Cornell Rice applied at A & I on September 18, 1974, and interviewed briefly with Espy. He said he would refer her application "upstairs" (i. e., to A & I). She later received a letter from Espy advising her that there were no jobs available.[57]

Rice's case is similar to Melvin Phillips's. The district court ruled against Rice because it found that she had been available for employment for only a few days, and

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54. Record at 458-59.

55. Plaintiffs' Exhibit 18; Transcript at 87-88, 150-51.

56. Plaintiffs' Exhibit 8.

57. Plaintiffs' Exhibit 1; Transcript at 23-27, 47-48.

there were no secretarial or clerical vacancies during that time. Again, though, there was no suggestion that Rice's application was removed from consideration prematurely, for no one at A & I knew of her new job. During the year following her application, A & I hired nineteen whites and six blacks in clerical jobs. If OMBE and CETA jobs are excluded, the figures are nine white, one black.[58] As with Melvin Phillips, the absence of any business justification for these hirings defeats the Board's rebuttal of the prima facie case established under *Franks* and *Teamsters*.

SUMMARY

To summarize our disposition of these cases:

We AFFIRM the judgment in the A & I case with regard to the issue of recusal.

We REVERSE the district court's refusal to certify the alleged classes in the PEER and College Board cases. Those cases are REMANDED for appropriate proceedings as to the administration of the class action and the merits of the class allegations. We MODIFY the class certification order in the A & I case to include in that class future applicants and persons deterred from applying for jobs with A & I.

We REVERSE the judgment in the A & I case that the plaintiffs did not establish discrimination against the class. The case is REMANDED for appropriate relief consistent with this opinion.

We REVERSE the court's judgments on the merits with respect to Barbara Phillips's individual claim in the PEER case; Melvin Phillips's individual claims in the PEER and A & I cases; and Cornell Rice's individual claims

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58. Plaintiffs' Exhibit 8.

in the A & I and College Board cases. We REMAND the cases for appropriate relief. We AFFIRM the district court's judgments as to the remaining individual claims.

Although we have refused to overturn the district court's denial of the plaintiffs' recusal motion, in light of later developments and all of the circumstances presented in these cases, we suggest that any proceedings on remand should be heard before a judge other than the Hon. William Harold Cox. We do so without in any way questioning the integrity or impartiality of that Judge; we act solely in the interest of preserving the complete appearance of impartiality. *See Webbe v. McGhie Land Title Co.*, 10 Cir. 1977, 549 F.2d 1358, 1361; *Eckles v. Sharman*, 10 Cir. 1977, 548 F.2d 905, 911; *United States v. Bray*, 10 Cir. 1976, 546 F.2d 851, 860; *United States v. Ritter*, 10 Cir. 1976, 540 F.2d 459, 464-65, *cert. denied*, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).

APPENDIX B

(Filed March 16, 1979)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J76-114(C)

BARBARA PHILLIPS, et al
PLAINTIFFS

VS.

THE JOINT LEGISLATIVE COMMITTEE ON PERFORFORMANCE EVALUATION AND EXPENDITURE REVIEW OF THE STATE OF MISSISSIPPI, et al
DEFENDANTS

OPINION OF THE COURT

This is an action filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e), et seq., and the Civil Rights Act of 1866, alleging that defendants failed or refused to hire the named plaintiffs or offer them employment because of their race. This case was originally filed as a class action, but the Court refused to certify it as such because plaintiffs failed to show the necessary prerequisites of a class action as set forth in Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure, including but not limited to the failure to prove the numerosity requirement. This matter, therefore, was tried on the individual claims of the respective plaintiffs against the defendants.

The complaint in this action was filed on December 23, 1975, by the Mississippi Council on Human Relations,

Barbara Phillips, Melvin Phillips, and Cornell Green Rice. Mississippi Council on Human Relations was dismissed by order of this Court previous to trial as having no real interest in the outcome of the litigation.

Defendants include the Joint Legislative Committee on Performance Evaluation and Expenditure Review of the State of Mississippi (hereinafter called PEER Committee) a statutory entity, created by the Mississippi Legislature in 1973, and the individual members of the PEER Committee. Among other duties, the PEER Committee is charged with producing investigatory reports for the use of the Legislature. These reports are detailed and intricate in nature. Highly qualified persons must be employed by the Committee in order to carry out adequately the functions of the Committee.

Barbara Phillips is a black female, who completed undergraduate school in St. Paul, Minnesota, with a major in history in 1971. In the summer of 1974 this plaintiff came to Jackson, Mississippi, after completing one year of law school at Northwestern University, to work with the Delta Ministry, a civil rights organization. During this period Miss Phillips approached a Michael Raff with the Mississippi Council on Human Relations, who provided the plaintiff with $50.00 and suggested various State agencies with which she might seek employment. Apparently she did not apply to any State agencies which had black employees, but sought those with all white personnel. Subsequent to this, Miss Phillips filed charges of discrimination against seven or eight of the State agencies .

Miss Phillips applied to the PEER Committee on July 12, 1974. She was interviewed by John Hamilton, the staff director, and John Turcotte, an executive. Mr. Turcotte stated that he was impressed with Miss Phillips and in-

tended to hire her. She was asked to submit writing samples, and Mr. Turcotte was of the opinion that she could have been their first "qualified black". Mr. Hamilton testified that although white applicants more qualified than Miss Phillips had applied, Miss Phillips was given special consideration because of the Committee's desire to employ qualified blacks. Miss Phillips delivered writing samples to the PEER Committee office on Monday, July 15, 1974, and retrieved them later that week. A charge of discrimination on her behalf was filed by Mississippi Council on Human Relations with the Equal Employment Opportunity Commission on Monday, July 22, 1974, ten days after her initial contact with the PEER Committee.

It is undisputed that after leaving her writing samples Miss Phillips received no further communication from the PEER Committee. Mr. Turcotte and Mr. Hamilton both testified that they had viewed this plaintiff on television on August 2, 1974, where she referred to the fact that she was a staff consultant with Mississippi Council on Human Relations, and later read an article in the newspaper confirming the fact that she was so employed. Since these two executives, charged with recommending applicants to the Committee for employment, believed that plaintiff Phillips had obtained employment elsewhere, her name was never recommended to the Committee.

There is serious doubt in the Court's mind at this time that Barbara Phillips was a bona fide applicant for a position with the PEER Committee. Plaintiff waited only ten days from her initial contact with PEER before filing a charge of discrimination, giving the Committee little time to act on her application. The proof indicates that after her conference with Michael Raff, it was her intention to seek out State agencies engaged in discrimination with the express purpose of initiating litigation. Although the

United States Court of Appeals for the Fourth Circuit has addressed this position in *Lea v. Cone Mills Corporation*, 438 F.2d 86 (1971), where it held that plaintiffs will not be denied relief solely because they are "test plaintiffs", and this factor would only go to any back pay awards which they might seek, this issue has not been raised in this Circuit. This Court does not condone such "ambulance chasing" on the part of any plaintiff, but finds it unnecessary to pass upon this issue as to a test plaintiffs' right to recover under the civil rights statutes because of the further findings and conclusions of the Court as set out hereinbelow.

Without passing on the *bona fides* of Barbara Phillips, this Court feels that certain principles of fair play must be followed in a Court of equity as this Court now sits, and that the plaintiff should give the defendant a reasonable time in which to display any discriminatory practices in which it may be engaged. The precipitous action of the plaintiff does not go unnoticed by this Court, and the short length of time between the application and the filing of the EEOC charge takes away from the credence of plaintiff Barbara Phillips in this case.

Melvin Phillips is a black male graduate of Tougaloo College, presently employed as assistant financial aid officer at Tougaloo. His work experience has been varied, as he has worked for the American Friends Service, a civil rights organization, and as the Parent Involvement Coordinator for a Head Start Program.

As did Miss Phillips, Melvin Phillips consulted with Michael Raff of the Mississippi Council on Human Relations, was given the sum of $50.00 and advised to make application at several State agencies. Mr. Phillips made application with the PEER committee on August 30, 1974,

and was interviewed by John Turcotte. Mr. Turcotte told Melvin Phillips, as he had also told Barbara Phillips, that his changes of being hired by the Committee were good as the Committee need qualified black employees. During that interview Mr. Phillips expressed a reservation about job-related travel, indicating he wished to remain at home with his wife and newborn child. This played a part in the decision not to hire Mr. Phillips, since the job he sought involved some travel. After this interview, Mr. Phillips never contacted the committee again, and a Mrs. Susan Hymel, who had a master's degree in social science, was hired. Mrs. Hymel possessed higher qualifications than did Mr. Phillips, although Mr. Turcotte stated Mr. Phillips was "minimally qualified" for employment.

Cornell Green Rice was during the summer of 1974 an employee of the Lawyers' Committee for Civil Rights Under Law. She made application at the PEER Committee on September 19, 1974, by leaving an unsigned application form with the receptionist, making no other contact with any person relative to the application. She sought employment as a clerk or a secretary; however, there were no positions available at the time of her application. This was the only contact which Mrs. Rice had with the PEER Committee at any time. There has been no testimony before this Court as to Mrs. Rice having been given any sum of money by Michael Raff.

On or about November 19, 1978, plaintiff Barbara Phillips was given a "right to sue" letter authorizing her to bring an action against the defendant PEER Committee. Plaintiffs Melvin Phillips and Cornell Green Rice made no charge to the EEOC, but one having been made on behalf of Barbara Phillips, it is unnecessary for jurisdictional purposes that plaintiffs Melvin Phillips and Cornell Green Rice also made a charge. See *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (1978).

At the present time there are approximately twenty members on the staff of the PEER Committee. The director of this committee has the responsibility of carrying out the work of the committee. John Hamilton was director of the PEER Committee staff from its inception until his resignation in August 1977, when John Turcotte assumed the position.

There are two basic positions in PEER: secretarial-clerical and research-analyst. Since its beginning, there have been three black employees of the Committee: Aster Hawthorne, Alvin Stamps, and Leon Survillion, all employed as analysts.

A great deal of time during the three day trial of this cause was taken up by the plaintiffs in the introduction of statistics in an attempt to persuade the Court to certify this action as a class action and to establish a pattern and practice of discrimination on the part of the PEER Committee. The proper use and value of statistical proof depends upon the facts and circumstances of each particular case. *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 843, 52 L.Ed.2d 396 (1978). It must be remembered that these are individual actions, not a class action. Statistics are eminently helpful where the Court is considering a class action involving a defendant employing a hundred or more persons, but are of minimal assistance in considering individual claims involving the employment practices of a small agency with a maximum of 26 employees.

The general employment practices of the defendant show no intent to discriminate against blacks. Notices were sent for posting on bulletin boards of integrated colleges throughout the South. Newspaper ads have been placed throughout the State of Mississippi and in surrounding municipalities. There has been no showing that de-

fendants have ever had a policy or practice of discriminating against black applicants; on the contrary, all of the testimony showed that the two persons charged with recommending applicants to the Committee were interested in obtaining qualified black applicants. Mr. Hamilton and Mr. Turcotte both testified that they recognized not only the legal duty of the Committee, but the practicality of hiring blacks on the staff of the PEER Committee, and this information was communicated to two of the three plaintiffs. Since the plaintiff Cornell Green Rice did not seek an interview, this fact was not communicated to her. In this regard, Mr. Turcotte testified that on Miss Phillips' application he wrote "This may be our first qualified black". Such a statement indicates Turcotte's desire to hire a black and to comply with the laws of the country.

This Court has jurisdiction of the parties and the subject matter inasmuch as the defendant has fifteen or more employees each working day in each of twenty or more calendar weeks occurring in the current or preceding years. It is, therefore, an employer within the meaning of 42 U.S.C. §2000(3), et seq.

The plaintiffs have stated a cause of action under Title VII or 42 U.S.C. §2000(e) as well as under 42 U.S.C. §1981 and §1983, which define the substantive right involved as the same rights to make and enforce contracts and to sue as enjoyed by white citizens and the prohibition against discrimination by the State against the plaintiffs.

For such a claim to prevail under the Civil Rights Act of 1866, purposeful and intentional discrimination must be proven. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Williams v. DeKalb County*, 577 F.2d 248. Assuming that the entity here is a proper defendant under the Civil Rights Act of 1866, no such purposeful discrimination has been shown by any of the

plaintiffs which gives rise to any action for damages against the institutional defendant herein. As for the members of the Committee, individually, this Court finds, for reasons more fully discussed in connection with plaintiffs' Title VII claim, that plaintiffs have failed to prove by a preponderance of the evidence that the defendants or any of them violated §1981 or §1983.

In a Title VII claim, plaintiffs must first prove a prima facie case against the defendants as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), that is, by showing: (1) that they belong to a racial minority; (2) that they applied and were qualified for a job for which the employer was seeking applications; (3) that despite their qualifications they were rejected; (4) that after their rejection the position remained open and the employer continued to seek applications from persons of plaintiffs' qualifications. If plaintiffs fail to prove a prima facie case, then the defendant is entitled to prevail. If a prima facie case is made, the burden shifts to the defendant to prove by a preponderance of the evidence some legitimate job-related nondiscriminatory reason for its failure to employ the plaintiffs. If the defendant fails to articulate a job-related and legitimate reason for its failure to employ the plaintiff, the plaintiff is entitled to prevail. If the defendant does carry its burden in this regard, then the plaintiff must prove by a preponderance of the evidence that the reasons articulated by the defendant are a mere pretext for actual racial discrimination on the part of the defendant. Should the plaintiff fail to meet that burden, the defendant is entitled to prevail, but if the plaintiff meets it, the plaintiff is entitled to judgment. See *Turner v. Texas Instruments*, 555 F.2d 1251 (5th Cir. 1977).

Plaintiff Cornell Green Rice has failed to establish a prima facie case on her claim since the proof showed that at the time of her application with the PEER Committee there were no vacancies in the secretarial and clerical positions which the plaintiff Rice sought; therefore, her claim must fail.

In regard to the claims of Barbara Phillips and Melvin Phillips, the Court finds that a prima facie case has been established under the prerequisites of *McDonnell Douglas v. Green, supra*; however, the defendants have articulated legitimate nondiscriminatory reasons for their failure to hire Miss Phillips and Mr. Phillips. The proof, as stated above, reveals that Miss Phillips was under consideration for employment and would have been hired had she not appeared on television and made statements to the effect that she was then employed with the Mississippi Council on Human Relations. This Court will not require the defendant to do a vain and futile thing such as offer the plaintiff, Miss Phillips, a job when it was apparent, and the defendants believed, that she was no longer available for employment at the PEER Committee. Witnesses Hamilton and Turcotte testified and this Court believes that had Miss Phillips remained available she would have been offered employment. Her own actions led to her nonemployment, and she cannot be the beneficiary of her misleading of the defendants.

In regard to plaintiff Melvin Phillips, the proof indicates that a more qualified person was hired. The prima facie case established by plaintiff Melvin Phillips having been sufficiently rebutted, this Court finds that Mr. Phillips was not discriminated against by the defendants because of race.

In summary, the Court finds that the defendant has proved by a preponderance of the evidence that the failure

to hire the plaintiffs Barbara Phillips and Melvin Phillips was for legitimate nondiscriminatory reasons. The plaintiffs having failed to show that these reasons articulated by the defendant were mere pretexts for discrimination against the plaintiffs, it is the opinion and judgment of this Court that the plaintiffs are entitled to no relief against the defendants.

An order conforming with the foregoing memorandum opinion, approved as to form by the attorneys for all parties, shall be submitted to the Court within the time and within the manner prescribed by the rules of this Court.

/s/ John R. Countiss III
United States Magistrate

Jackson, Mississippi
March 16, 1979

APPENDIX C

(Filed March 22, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J76-114(C)

BARBARA PHILLIPS, ET AL.,
Plaintiffs

v.

THE JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW OF THE STATE OF MISSISSIPPI, ET AL.,
Defendants.

JUDGMENT

Pursuant to the written consent of the parties, this civil action came on for trial before the court, The Honorable John R. Countiss, III, United States Magistrate, presiding, and the issues having been duly tried and the court having filed its opinion in this action on March 16, 1979.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the plaintiffs are entitled to no relief against the defendants; that the plaintiffs take nothing in this action; that the plaintiffs' complaint and this action be, and they hereby are, dismissed with prejudice on the merits; and that all costs incurred in this action be, and they hereby are, assessed against the plaintiffs, Barbara Y. Phillips, Melvin Phillips, and Cornell Green Rice.

SO ORDERED, ADJUDGED, AND DECREED, this, the 22 day of March, 1979.

/s/ John R. Countiss III
United States Magistrate

APPROVED AS TO FORM:

/s/ Nausead Stewart
Nausead Stewart
Attorney for Plaintiffs

/s/ Hubbard T. Saunders, IV
Hubbard T. Saunders, IV
Attorney for Defendants

APPENDIX D

(Filed March 26, 1979)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION
CIVIL ACTION NO. J76-114(C)

BARBARA PHILLIPS, ET AL
PLAINTIFF

VS.

THE JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW OF THE STATE OF MISSISSIPPI, ET AL
DEFENDANTS

FINAL JUDGMENT ADOPTING MAGISTRATE'S ORDER AS JUDGMENT OF THE COURT

This civil action coming on after reference to the United States Magistrate for trial and decision and thereafter tried by the United States Magistrate on February 26 - 28, 1979, and it appearing that an opinion was entered by the Magistrate on March 16, 1979, and a final order in conformance with said opinion having been signed by the United States Magistrate and filed on March 22, 1979, the undersigned United States District Judge, having reviewed the proceedings conducted before the United States Magistrate, together with the findings of fact and conclusions of law and the final order filed in this action, hereby adopts and ratifies said findings of fact and conclusions of law and final order as the final decision and judgment of this Court.

ORDERED AND ADJUDGED, this, the 22nd day of March, 1979.

/s/ Harold Cox
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 79-2131

D. C. Docket No. CA-J76-114-C

BARBARA PHILLIPS, CORNELL GREEN RICE, MELVIN PHILLIPS, and MISSISSIPPI COUNCIL ON HUMAN RELATIONS, a corporation, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

THE JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE AND EXPENDITURE REVIEW OF THE STATE OF MISSISSIPPI, ET. AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Before WISDOM, RUBIN and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and that this cause be and the same is hereby reversed and remanded in part to the said

District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

February 23, 1981

ISSUED AS MANDATE:

APPENDIX F

(Filed April 27, 1981)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 79-2131, 79-2940, 79-3550

UNIT A

Barbara PHILLIPS, Cornell Green Rice, Melvin Phillips, and Mississippi Council on Human Relations, a corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE AND EXPENDITURE REVIEW OF the STATE OF MISSISSIPPI et al., Defendants-Appellees.

The MISSISSIPPI COUNCIL ON HUMAN RELATIONS, a corporation, Barbara Phillips and Cornell Green Rice, individually and on behalf of all others similarly situated, Plantiffs-Appellants,

v.

The BOARD OF TRUSTEES OF the INSTITUTION OF HIGHER EDUCATION a/k/a The State College Board et al., Defendants-Appellees.

Barbara PHILLIPS, Melvin Phillips and Cornell Green Rice, individually and on behalf of a class, Plaintiffs-Appellants,

v.

The STATE OF MISSISSIPPI AGRICULTURAL AND INDUSTRIAL BOARD et al., Defendants-Appellees.

Appeals From the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING

(April 27, 1981)

Before WISDOM, RUBIN and SAM D. JOHNSON, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Opposition

Office-Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-181

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE JOINT LEGISLATIVE COMMITTEE FOR PERFORMANCE, EVALUATION, AND EXPENDITURE REVIEW OF THE STATE OF MISSISSIPPI, et al.,

Petitioners,

v.

BARBARA PHILLIPS and MELVIN PHILLIPS, Individually and on Behalf of a Class,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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September 1981
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-181

THE JOINT LEGISLATIVE COMMITTEE FOR PERFORMANCE, EVALUATION, AND EXPENDITURE REVIEW OF THE STATE OF MISSISSIPPI, et al.,

Petitioners,

v.

BARBARA PHILLIPS and MELVIN PHILLIPS, Individually and on Behalf of a Class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Barbara Phillips and Melvin Phillips respectfully request that this Court deny the Petition for Writ of Certiorari in this case.

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), provides:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race . . . ."

STATEMENT

Respondents Barbara Phillips and Melvin Phillips are blacks who in 1974 applied for employment with the Joint Legislative Committee on Performance, Evaluation, and Expenditure Review ("PEER"), an arm of the Mississippi Legislature that reviews the performance and expenditures of state agencies.

Barbara Phillips applied to the Committee on July 12, 1974, and was interviewed by the staff director, John

Hamilton, and a staff auditor, John Turcotte. Both were very impressed with her credentials, her manner and her knowledge of PEER's functions. According to their testimony, they immediately decided to hire her but did not so advise her. Instead, they delayed for some time as they mulled over the "significance" and "complexities" of hiring the first black at PEER. They were concerned about the reaction of the white legislators and staff and Phillips' reaction to the white-dominated environment of the job.

Three weeks after the interview, Hamilton and Turcotte learned from a television news report and newspaper articles that Ms. Phillips had filed an EEOC charge against PEER and that she acted as a consultant to the Mississippi Council on Human Relations. According to

Hamilton and Turcotte, they would have hired her but for these news reports.

Melvin Phillips applied for employment with PEER on August 30, 1974, and was interviewed by Turcotte. Phillips submitted an employment application that indicated he left his prior position because it required him to travel too much. Turcotte told Phillips of the travel requirements of the available position, and Phillips expressed no reservations about them. When Phillips called the day after the interview, he was told that there were no openings.

This action was filed in 1975 by three individuals and the Mississippi Council on Human Relations on behalf of themselves and a class of past, future and deterred black applicants for

employment.*/ After trial before a magistrate, the claim of one individual, Cornell Green Rice, was dismissed because she did not establish a prima facie case of discrimination under the standards stated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The magistrate concluded that Barbara Phillips and Melvin Phillips had both proved prima facie cases of racial discrimination with respect to the rejection of their applications but ruled that the presumption of discrimination was rebutted by PEER's articulation of legitimate nondiscriminatory reasons for not hiring them. The magistrate refused to certify the case as

---

*/ The Mississipi Council on Human Relations was dismissed as a party prior to trial on the ground that it had no real interest in the litigation.

a class action because the proposed class was not shown to be so numerous that joinder was impracticable. The district court adopted the findings and order of the magistrate in all respects.

The court of appeals reversed the dismissal of the individual claims of Barbara Phillips and Melvin Phillips and the denial of class certification. The petitioners present no question concerning the court of appeals' action on the class certification.

ARGUMENT

The petition states no cognizable reasons why the judgment of the court of appeals on the employment discrimination claims of Barbara Phillips and Melvin Phillips should be reviewed. Both issues presented for review are premised on

petitioners' disagreement with the court of appeals' evaluation of their rebuttal evidence. Petitioners do not explain why this Court should resolve what is, in essence, a factual dispute, or why this case is more suitable for review than any of the scores of employment discrimination actions decided by the courts of appeals every year.

1. Petitioners' contention that the court of appeals did not apply the "clearly erroneous" standard in reviewing these claims is based on a misreading of the court's opinion. In reciting the framework for its decision on the merits of individual claims in this case and the related cases heard with it, the court stated that the clearly erroneous standard applied to subsidiary findings of fact but, following consistent rulings of the

Fifth Circuit, not to an ultimate finding of discrimination or nondiscrimination. (Pet. App. A31-A32.) The individual claims in this case turned on the correctness of subsidiary findings of fact. The ultimate finding of no discrimination simply fell with the elimination of the clearly erroneous subsidiary finding.

The reversal of the judgment on Barbara Phillips' claim resulted from the court of appeals' rejection of the subsidiary finding that she had not shown that the explanation proffered by PEER for not hiring her was a pretext. The court explicitly stated that this finding was clearly erroneous. (Pet. App. A33.) In the case of Melvin Phillips, the reversal of the district court's judgment followed from the court of appeals' setting aside the subsidiary finding that

he was denied employment because he told the interviewer, John Turcotte, that he had a reservation about the job-related travel. The court of appeals stated that this finding was clearly erroneous; that there was "literally no evidence" to support it; and that John Turcotte himself testified to the contrary. (Pet. App. A34.) The record in this case therefore presents no question remotely comparable to the question the Court has agreed to hear in Pullman-Standard v. Swint, No. 80-1190, and United Steelworkers v. Swint, No. 80-1193. There is no reason to hold this case to await the outcome of those cases.

2. Petitioners' second contention is that the standard against which the court of appeals evaluated their rebuttal evidence is inconsistent with the decision

of this Court in Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981), decided after the decision below. Petitioners assert that, once respondents had introduced sufficient evidence to create a presumption that petitioners had refused to hire Barbara Phillips and Melvin Phillips because of their race, the court of appeals imposed on them the burden of proving by a preponderance of evidence that they had legitimate nondiscriminatory reasons for their actions. It did not. The court of appeals knew that the Burdine case was pending here and might result in the disapproval of its rule requiring rebuttal by a preponderance of the evidence. It stated that none of the individual claims in this case and the two companion cases depended on the applicability or

nonapplicability of the preponderance standard. (Pet. App. A31 n.22.) In subsequent cases the Fifth Circuit has employed this Court's Burdine formulation of the employer's burden. E.g., Sessions v. Rusk State Hospital, 648 F.2d 1066, 1070 (5th Cir. 1981).

The fact is that in Barbara Phillips' case, petitioners' own testimony came very close to an admission of intentional racial discrimination. Petitioners conceded that they delayed carrying out a decision to hire Ms. Phillips because they were concerned about the reaction of the white legislators and staff to the hiring of PEER's first black. After a delay of three weeks, they learned that she had filed a discrimination charge and was acting as a consultant to the Mississippi Council on Human Relations,

and they decided not to hire her. If this explanation of the decision not to hire Ms. Phillips does not describe an act of unlawful retaliation in violation of section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), the least it shows is that, but for the delay occasioned by Ms. Phillips' race, she would have been hired before she filed a charge and before PEER learned of her relationship with the Mississippi Council on Human Relations. There is no real doubt that the evidence satisfies Ms. Phillips' ultimate burden of persuading the court that she was the victim of unlawful discrimination and that the ruling of the court of appeals is consistent with Burdine.

On the claim of Melvin Phillips, the court of appeals ruled that the petitioners' explanation for not hiring him was no explanation at all. That is, in the words this Court was to use in Burdine, petitioners' evidence was not such as "would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." 101 S. Ct. at 1096. Petitioners offered the implausible explanation that PEER rejected Mr. Phillips' application because the interviewer Turcotte believed that, because of his reason for leaving his last job, Phillips would not want to travel, even though Phillips expressed no reservations about the travel requirements of the job he was applying for when they were explained to him. The underlying premise of McDonnell Douglas is that

racial discrimination can be inferred where a decision, especially in an important business context, is ostensibly based on arbitrary reasons or no reasons at all. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). It would completely undermine the analytic framework established by McDonnell Douglas to allow an implausible and nonsensical explanation by an employer to constitute a sufficient rebuttal of the presumption of discrimination raised by a prima facie case. That is why this Court emphasized in Burdine that an employer's explanation must be "legally sufficient." 101 S. Ct. at 1094.

This Court has repeatedly recognized that the McDonnell Douglas standards must be applied flexibly in differing factual situations. Texas Department

of Community Affairs v. Burdine, 101 S. Ct. at 1094 n.6. Not every such application of the standards can be reviewed by this Court. As noted by the Fifth Circuit, the important question is whether the court examined the pertinent facts and ultimately insisted upon the proper allocation of the burden of persuasion. Sessions v. Rusk State Hospital, 648 F.2d at 1071. The careful review of the evidence by the court of appeals in this case is sufficient to ensure that there is no unfairness to the petitioners in the decision that respondents met their ultimate burden of persuasion.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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September 1981